In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-431

JERRY K. CLARK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. Petitioners brought this action for damages in the Court of Claims, after the United States District Court had ordered their transfer from active military duty to reserve status. Petitioners are former Air National Guard officers who were ordered to active duty on January 26, 1968, pursuant to Paragraph (c), Title I, Public Law 89-687, 80 Stat. 981, authorizing the activation of units of the Ready Reserve. Subsequent to their activation, petitioners

brought suit in the district court, claiming that their call to active service was unlawful, since at the time of the call-up, they were not properly in the Ready Reserve, but in the Standby Reserve. They maintained that the Ready Reserve Agreements which they had signed, by which they agreed to remain in the Ready Reserve for a stated period, had expired prior to January 26, 1968, and had not been renewed. Accordingly, petitioners argued that, upon the termination of their respective agreements, they no longer belonged to the Ready Reserve, and that the Air Force was under an obligation to transfer them immediately to Standby Reserve status.

The district court ordered petitioners transferred to Standby Reserve because the pertinent Air Force Regulation "states that if * * * the member does not renew his Ready Reserve agreement, he will be immediately reassigned to Standby" (Pet. App. C, p. 21). The court of appeals affirmed (Pet. App. B).

Petitioners then instituted the present action in the Court of Claims to recover for the damages they allegedly suffered as a result of their unlawful activation.[1] The Court of Claims dismissed their suit for lack of jurisdiction.

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[1] Petitioners claim damages "for lost wages, retirement credits, job experience and training, employment and advancement opportunities, loss of the society of their families, involuntary risk of their lives, deprivation of property in violation of the 5th Amendment to the United States Constitution, and involuntary servitude in violation of the 13th Amendment to the Constitution" (Pet. App. A, p. 16).

2. The holding of the Court of Claims—that it lacked jurisdiction over the case because, among other reasons, "the claims of the plaintiffs sound in tort" (Pet. App. A, p. 16)—is correct. There is no conflict in decisions, and the issue is not recurrent. Accordingly, further review is not warranted.

In their attempt to establish jurisdiction under the Tucker Act, 28 U.S.C. 1491, petitioners argue (Pet. 10) that their activation, since it came after their Ready Reserve Agreement had expired, constituted a breach by the United States of an express contract —*i.e.*, the Ready Reserve Agreement. In rejecting this contention, the Court of Claims properly pointed out (Pet. App. A, p. 16) that

> [e]ven if it could be said, arguendo, that the agreements imposed obligations on the Air Force, the plaintiffs have no claim for breach of contract because the agreements terminated by their own provisions more than three months before the plaintiffs were called to active duty. In other words, the events of which plaintiffs complain occurred long after their Standby [sic] Agreements had expired. Therefore, the action taken by the Air Force was not a breach of the terminated agreements.

Petitioners were activated in 1968 because the Air Force, contrary to its own regulations, had not transferred them to standby status upon the expiration of their Ready Reserve Agreements. Any injuries petitioners may have suffered as a result of being called to active duty, therefore, are attributable to the

violations of these regulations, and not to any breach of the Ready Reserve Agreement. While the Tucker Act does confer upon the Court of Claims jurisdiction over "any claim against the United States founded either upon the Constitution, or any act of Congress, or any regulation of an executive department * * *" it is settled that jurisdiction only lies under this provision where the "particular provision of law [whether Constitution, statute or regulation] relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum." *Eastport Steamship Corporation* v. *United States*, 372 F. 2d 1002, 1007 (Ct. Cl.).

The regulation involved here merely directs Air Force officials to transfer Ready Reserve members to Standby status upon termination of their Ready Reserve Agreements. It in no way gives members a right to compensation for damages resulting from the Air Force's failure to follow the transfer directive.[*]

Moreover, the failure to act was predicated on an erroneous construction of the regulation. Suits against the United States based on such conduct are expressly prohibited by the Tort Claims Act, 28 U.S.C. 2680 (a). The court below properly determined, there-

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[*] The claim based upon the Thirteenth Amendment is similarly insubstantial. Like the regulation violated by the Air Force, the constitutional provision allegedly violated here contains no "right to be paid a certain sum." *Eastport Steamship Corporation* v. *United States*, *supra*, 372 F. 2d at 1007. This claim is therefore also beyond the jurisdiction of the Court of Claims.

fore (Pet. App. A, p. 17), that it was unnecessary to transfer the case to the district court.[8]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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[8] Petitioners also contend that the Court of Claims had jurisdiction because their activation amounted to a taking requiring compensation under the Fifth Amendment. The court below correctly rejected this claim, since petitioners "have not shown that the government has taken any of their property within the meaning of the Fifth Amendment" (Pet. App. A, p. 17).

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